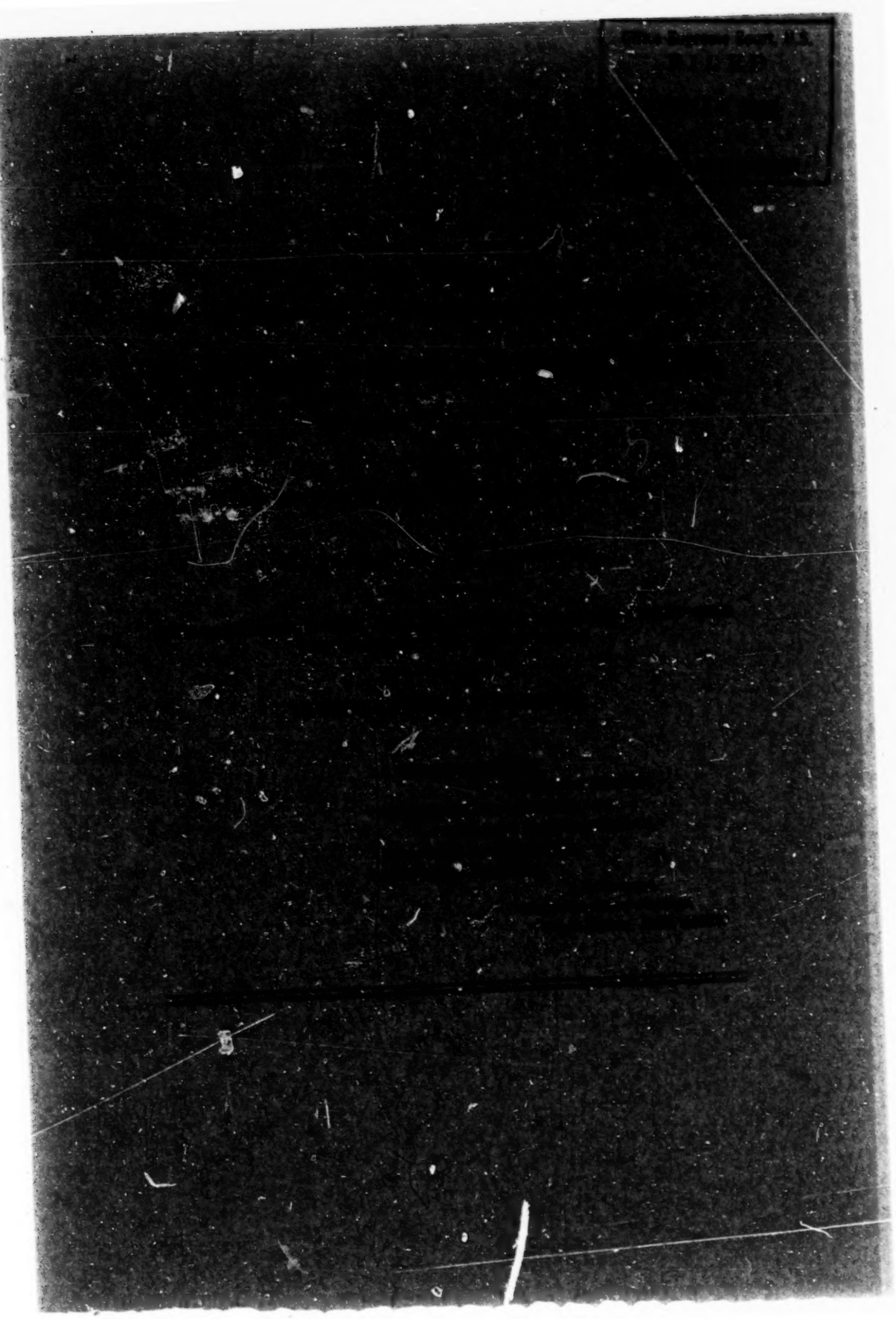

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

CONTINENTAL OIL COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT

OPINION BELOW

The district court granted appellee's motion for summary judgment without an opinion or findings of fact and conclusions of law, but advised counsel of its intention to enter summary judgment by letter, as set forth in the Statement, *infra*, p. 8.

JURISDICTION

The judgment of the district court entering summary judgment and dismissing the complaint as to defendants, Continental Oil Co. and Hondo Oil and Gas Co., was entered on September 27, 1963 (Appendix, *infra*, pp. 22–23). The United States filed a notice of appeal from the dismissal of the complaint

as to Continental Oil Co. on November 26, 1963. The jurisdiction of the Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Diebold, Inc.*, 369 U.S. 654; *United States* v. *du Pont & Co.*, 353 U.S. 586.

QUESTION PRESENTED

Whether the district court improperly granted summary judgment dismissing the government's complaint charging that an acquisition of corporate assets violated Section 7 of the Clayton Act, where the court made no findings and rendered no opinion and the following issues were in dispute: (1) whether the State of New Mexico constituted a relevant submarket; (2) whether the two companies were in competition prior to the acquisition; (3) whether the acquiring company had engaged in anticompetitive conduct following the acquisition; and (4) whether there were mitigating circumstances which justified the acquisition.

STATUTE AND RULE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the

country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Rule 56(c) of the Federal Rules of Civil Procedure, as amended July 1, 1963, provides in pertinent part:

> SUMMARY JUDGMENT.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *

STATEMENT

1. THE AMENDED COMPLAINT

On October 23, 1961, the United States filed an amended complaint against Continental Oil Company alleging that Continental's acquisition of certain assets of Malco Refineries, Inc., was unlawful under Section 7 of the Clayton Act.[1] The transaction in question is the lease by Continental of Malco's refinery at Artesia, New Mexico, for a period of twenty

[1] Hondo Oil and Gas Co. (the name adopted by Malco after the acquisition) was also named a defendant. The United States' original complaint had named Continental as the sole defendant. On September 18, 1961, the district court, on motion by Continental, ordered that Hondo be made a party and that the government amend its complaint accordingly.

years for a total consideration of $7,450,000 [2] and with an option to Continental to purchase the refinery at the end of the term for $100,000. In addition, Continental purchased Malco's crude oil pipeline and gathering facilities, its marketing facilities and the trade name "Malco" (Amended Complaint, par. 23).

The complaint alleged that at the time of the acquisition on May 1, 1959, Continental was a major integrated oil company engaged in the purchasing, production and refining of crude oil, as well as the distribution and marketing of refined petroleum products in twenty-six states in the mid-continent areas of the United States; that Continental owned one of seven crude oil refineries in New Mexico and accounted for approximately 13 percent of the State's refining capacity; that Continental sold nearly 10 percent of the gasoline consumed in New Mexico; and that substantially all such gasoline was marketed at "major brand" retail prices under the name "Conoco" through 233 service stations owned or leased by or under contract to Continental. (Amended Complaint, pars. 4–10, 14–17).

Malco was an independent oil company engaged in the purchasing, production and refining of crude oil and in the distribution and marketing of refined oil. The complaint alleged that its Artesia, New Mexico, refinery, acquired by Continental, constituted 40 percent of the State's refinery capacity; that gasoline produced at the refinery was marketed primarily in

[2] Exh. No. 1 to motion of Continental Oil Co. to add Hondo Oil and Gas Co. as a Party defendant, p. 3. (filed Aug. 7, 1961).

New Mexico and constituted 11.5 percent of the total gasoline consumed in the State; that Malco sold its gasoline to jobbers and distributors at prices below those charged by the major oil companies; that these jobbers in turn sold to so-called "cut-rate" service stations, including 200 stations selling under the name of "Malco," which sold at prices 2 cents below the prices charged by the major oil companies; and that the jobbers, distributors and 200 service stations "depended upon Malco as a source of supply of gasoline to enable them to continue in business and to compete with distributors and service stations handling gasoline under the brand names of major oil companies" (Amended Complaint, pars. 11–13, 14, 18–21).

The complaint alleged, *inter alia*, that as a result of the acquisition the largest supplier of "cut price" gasoline in New Mexico was eliminated, that Continental increased its relative share of the New Mexico market for the sale of gasoline from 10 percent to 20 percent and that there was an undue increase in concentration of the supply and marketing of gasoline in the hands of the major integrated oil companies. The effect of this, it was charged, was the actual or potential elimination of competition between the companies in the wholesale and retail marketing of gasoline in New Mexico (Amended Complaint, par. 23).

2. THE ANSWER

Continental's answer admitted certain facts relevant to the description of the two companies and their production and marketing activities. However, it denied the major part of the government's allegations, in-

cluding the charge that the acquisition would tend substantially to lessen competition. In its defense, Continental alleged, *inter alia,* that New Mexico does not constitute a gasoline marketing area (pars. 15, 18), that there was no substantial competition in New Mexico in the marketing of "Conoco" and "Malco" gasoline (pars. 16, 17), and that the competitive positions of the two companies justified the acquisition (Second Defense).

3. PRETRIAL PROCEEDINGS

In discovery proceedings, the government served two sets of interrogatories on Continental calling for factual information and documents and took nearly 750 pages of testimony in the deposition of eight Malco and Continental officials. The parties stipulated facts dealing with such matters as the financial status of both companies and the location of their retail outlets, and identified and authenticated documents (reserving various objections).

In a pretrial order issued July 17, 1963, the court defined the relevant geographic market area to include New Mexico, El Paso County, Texas, and the eastern half of Arizona, but specifically provided that the government "is not precluded from offering evidence on the trial of a sub-market area as contended by [it]." The order also established a time schedule for motions for summary judgment and trial.

4. CONTINENTAL'S MOTION FOR SUMMARY JUDGMENT

Based upon "the record on the pre-trial hearing and the pre-trial order, the pleadings, the stipulation of

facts entered into by the parties, the answers to interrogatories, the oral depositions and all documents referred to in the stipulations as to documents," Continental filed a motion for summary judgment contending that there was no genuine issue as to any material fact and that it was entitled to judgment as a matter of law. In support of its motion Continental submitted a 44-page brief and a 111-page appendix, in which it argued, *inter alia,* (1) that the nature and purpose of the agreement was such as to show that the acquisition did not have any anticompetitive effects; (2) that the increase in Continental's share of the refining capacity in the relevant market was *de minimis;* (3) that there was no substantial competition between Continental and Malco before the acquisition, and that whatever competition may have existed between them or their respective customers has continued and is assured for the future because Continental has continued to conduct the business of its Malco subsidiary in the same manner as Malco had conducted it when it was an independent company; and finally, (4) that its acquisition of Malco had intensified rather than diminished competition.

5. GOVERNMENT'S OPPOSITION TO THE MOTION

The government filed a detailed brief in opposition to the motion and submitted affidavits by an economist, two gasoline distributors and two attorneys (Chamberlain Aff.; Lake Aff.; Gaffey Aff.; O'Reilly Aff.; and Somerville Aff.) controverting factual allegations made by Continental. The major issues in dis-

pute between the parties are discussed below (infra, pp. 9–17).

6. THE DISTRICT COURT'S DECISION

Final argument on Continental's motion was set for September 4, 1963, but on August 26, 1963, the court vacated the order for hearing. The court then sent counsel the following letter on September 24, 1963:

> After a study of the pleadings, stipulations and exhibits, together with the very comprehensive briefs filed by both the Government and the defendants, the Court is constrained to grant the defendants' Motion for Summary Judgment.
>
> It may well be that there remains in the case certain disputed issues of fact, but I do not feel that they are material, and even if found in the Plaintiff's favor, it would avail them nothing.

On September 27, 1963, the court (the late Judge Waldo H. Rogers) entered its order granting summary judgment and dismissing the amended complaint. The court did not enter findings of fact and conclusions of law nor did it write an opinion, although its order and judgment did state "that there is no genuine issue as to any material fact and the defendants are entitled to a judgment as a matter of law."

THE QUESTION IS SUBSTANTIAL

This appeal presents an instance of a clear misapplication of the summary judgment procedure to a complicated antitrust case arising under Section 7

of the Clayton Act. On Continental's motion for summary judgment, there were four factual issues in genuine dispute. If the court resolved these disputed issues in favor of the party opposing the motion, as it was required to do, *Poller* v. *Columbia Broadcasting,* 368 U.S. 464, 473, then it is clear that the acquisition is prohibited by Section 7. *United States* v. *Philadelphia National Bank,* 374 U.S. 321; *Brown Shoe Co.* v. *United States,* 370 U.S. 294. Accordingly, the district court was required to deny the motion and afford the government an opportunity to prove its contentions at a trial. Rule 56(c), F.R. Civ. P.

1. The issues in dispute were as follows:

a. *Whether the State of New Mexico is a relevant submarket in which to view the competitive effects of the acquisition.*—A necessary step in determining whether an acquisition violates Section 7 is the determination of the relevant market in which to view the effects. *United States* v. *du Pont & Co.,* 353 U.S. 586, 593; *Brown Shoe Co.* v. *United States,* 370 U.S. 294. The government's complaint charged that New Mexico formed a relevant market and Continental denied the contention in its answer. On summary judgment Continental's presentation was based solely on the larger relevant market as defined by the court's pretrial order. It did not demonstrate that there were no relevant submarkets or deal with the effect of the acquisition in such areas.

Pursuant to the pretrial order, which left it open to the government to offer "evidence on trial of a sub-

market area as contended by [it]," the government, by affidavit and in its brief, presented data to show that New Mexico by itself was a relevant submarket. It is the fifth largest state in area (App. 27, note 14)[3] and consumed 408,582,000 gallons of gasoline in 1961 (First Stip., par 1). Both companies considered New Mexico a distinct market; indeed, the principal reason urged by Continental officials for acquiring the Malco refinery was that it would guarantee a supply for the New Mexico market (I.D. 18, 21, 43, 47, 58, and 59; Lackey Dep. 50–51). Both companies owned and operated refineries in Artesia, New Mexico (First Stip., par 2(a)). In 1958 Continental supplied about 58 percent of its requirements of gasoline for New Mexico from its Artesia refinery (First Stip., pars. 8, 9). Similarly, about 72 percent of Malco's sales were made in New Mexico (Gaffey Aff., p. 4, table 1). New Mexico may be distinguished from the rest of the market defined by the court by the fact that, to a major extent, it is supplied by different sources of supply than are Arizona and El Paso County, Texas (Govt. Br. p. 17; First Stip., pars. 2(a), (b), and 3(a), (b)).

[3] Citation is to the appendix to the brief submitted by Continental Oil Co. in support of its motion for summary judgment. "Con. Br." refers to its brief in support of the motion. Other material in the record filed with the Clerk of the Court is cited as follows: The affidavits filed by the government in opposition to Continental's motion for summary judgment are cited as "Aff." preceded by the name of the affiant. "Stip." refers to the stipulations entered into by the parties. "I.D." refers to the documents identified by number in "The Second Stipulation as to Certain Documents" and "Dep." refers to the transcript of the depositions taken.

b. Whether Continental and Malco were in competition prior to the acquisition.—The existence and extent of competition between the acquiring and acquired companies is obviously a material fact in determining whether the acquisition may tend substantially to lessen competition. *Brown Shoe Co.* v. *United States, supra,* at 335. Continental contended that it did not compete with Malco before the acquisition. Its basic contention was that it catered to one class of trade while Malco catered to another (Con. Br. pp. 33–34): that Malco's output was sold from its refinery to wholesale distributors or chain operators in large lots (the "tank car" level) while Continental sold chiefly to service stations (the "tank wagon" level) and that the "tank wagon" market is entirely different from the "tank car" market (Con. Br. p. 31). Although both companies did sell at the "tank wagon" level, Continental contended that they did not compete at this level because Continental sold only to franchised "Conoco" brand jobbers, whereas Malco sold only to independent or unfranchised distributors (Con. Br. p. 32). It also contended that the two companies did not compete at the retail level since the retail gasoline stations selling gasoline produced by Malco were independent operators over whom Malco had no control (Con. Br. p. 33), and that in any event "comparatively few retail outlets selling under the brand names of 'Conoco' and 'Malco' were close enough together to compete with one another" (Con. Br. p. 33). Continental urged the court to "take judicial notice, based on personal observation, of this fact

of life in the retailing end of the oil business" (App. 79).

The government contested Continental's assertions that it did not compete with Malco before the acquisition. Both companies sold or exchanged substantial amounts of gasoline to other refiners. In 1958 such sales by Malco exceeded twenty-two million gallons, and comparable sales and exchanges by Continental were in excess of ten million gallons. Both companies considered themselves in competition with each other at the retail level (Lackey Dep. 140–141; Copple Dep. 33; Liddell Dep. 36–37). J. W. Liddell, a Continental vice president, testified that independent stations compete with "Conoco" stations and that price cutting causes customers to shift from one to the other. Other deponents emphasized that if the traditional price margins between independents and major brands are widened or narrowed there is consumer reaction to such price changes (Liddell Dep. 37; Copple Dep. 40–41; Swanson Dep. 24–25; Frost Dep. 22–23).

The government also disputed the defense claim that the "Malco" and "Conoco" stations were not near enough to one another to compete. There were 34 places in New Mexico where both Conoco and Malco gasoline were sold at retail. 52.1 percent of "Conoco" retail outlets in New Mexico were in towns or cities having "Malco" outlets and 78.2 percent of the "Malco" retail outlets were in towns or cities also having "Conoco" stations. In Albuquerque alone, there were 56 Conoco and 16 Malco stations at the time of the acquisition. Similarly, in Roswell, New

Mexico, there were 10 Conoco stations and 7 Malco; in Artesia, 3 Conoco and 6 Malco; in Carlsbad, 6 Conoco and 7 Malco; in Las Cruces, 9 Conoco and 2 Malco; and in Gallup, 4 Conoco and 5 Malco stations (First Stip., par. 17).

c. Whether Continental engaged in anticompetitive conduct with respect to Malco's customers after the acquisition.—Another issue in dispute between the parties was whether Continental used the acquisition of Malco to enable it to engage in anticompetitive conduct, and whether competition between the two companies and the dealers in the companies' products had in fact been restricted following the acquisition.

Continental maintained that any competition which may have existed between it and Malco or between their respective customers has continued (Con. Br. p. 33); and that it instructed Malco's personnel to continue operating Malco separately and independently of Continental (Con. Br. p. 35). Continental claimed, in conclusion, that "the agreed facts establish that Continental has continued to supply substantially the same customers and on the same basis * * *. The documentary evidence and the undisputed testimony establish that Continental desired to retain Malco's markets and to continue to supply the same jobber-distributor customers" (Con. Br. p. 35).

Those contentions were directly disputed by the government which submitted affidavits to show that Continental exercised control over Malco officers and instructed them to limit competition between Malco stations and the major brand gasoline stations (Chamberlain Aff.; O'Reilly Aff.; Somerville Aff.).

Continental's officers testified in their depositions that the company's policy was to eliminate sales to "rebranders" (stations which purchase gasoline and then sell it under their own name), and Malco's president testified that he urged Malco's jobbers not to sell to rebranders (Copple Dep. 47, 80–81).

The affidavit of Cletus Chamberlain, an independent distributor of Malco products, stated that "[s]ince the acquisition, Continental has dictated the policies and practices of Malco Products, Inc., and has exercised control of [Chamberlain's] pricing and marketing policies" (Chamberlain Aff. 2). Malco's officers, on instruction from Continental, threatened to raise the price of gasoline to Chamberlain if he did not eliminate rebrand accounts (Chamberlain Aff. 2–3). He was forced to cut the traditional two-cent differential between "Malco" and major "branded" gasoline to only one cent, and to discontinue sales to three companies which operated discount stations but which refused to abide by Malco's new one-cent discount policy (Chamberlain Aff. 3–4).

The government showed further that after the acquisition Malco told one owner of a gasoline marketing firm that it would no longer sell him gasoline (O'Reilly Aff. 1). Another individual who had been marketing gasoline in New Mexico for about 15 years regularly purchased substantial quantities of gasoline from Malco both before and after the acquisition. However, after his company was awarded, on competitive bids, a contract to supply a municipal corporation with gasoline for several years, Malco re-

fused to sell gasoline and has refused to sell to him ever since (O'Reilly Aff. 2–3). Still another distributor related that, after the acquisitions, Malco officials told him not to sell to rebrand accounts and tried to dictate his pricing policies (Somerville Aff. 3).[4]

d. Whether there were mitigating circumstances which justified the acquisition, even if anticompetitive.—Finally, Continental asserted that the acquisition was justified by economic necessity generated by competitive threats to both companies. It showed that Malco had suffered a decline in its market position between 1955 and 1958. This decline was caused by construction of products pipelines into New Mexico and Arizona which resulted in Malco's competitors having a lower cost for their gasoline, and by the entry into the market of new competitors which sold both branded gasoline and cut-rate unbranded gasoline (Con. Br. p. 40). From these factors Continental concluded that "[i]t is apparent that if Mr. Anderson [Malco's president] had not leased his refinery to Continental, he would have been forced to have closed it and the jobber-customers would have lost their source of supply" (Con. Br. p. 43). Continental also

[4] These statements were included in affidavits submitted by government counsel and represent evidence which the government would offer at trial. Government counsel advised the court that the individuals making the statements were reluctant to furnish affidavits because they feared retaliation. (O'Reilly Aff. 2, 3). Their testimony could, of course, be compelled at trial. Rule 56(f), F.R. Civ. P., indicates the inappropriateness of summary judgment in these circumstances. See also Advisory Committee's note to amend Rule 56, H. Doc. 67, 88th Cong., 1st Sess., p. 45.

contended that it had sustained drastic reductions in its share of the market, that its refinery at Artesia was antiquated and that it was faced with the alternative of obtaining a new source of supply or pulling out of the New Mexico market (App. 46).

Even aside from the fact that these assertions do not bring Continental within a failing company defense, *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 302, the government disputed certain of the facts as well as the inferences drawn from them, thus necessitating a trial. *United States* v. *Diebold, Inc.,* 369 U.S. 654. There was no allegation that Malco was insolvent or deeply in debt. The company had a satisfactory supply of crude oil and a network of pipelines to gather this supply for delivery to its refinery at Artesia (Lackey Dep. 13–21). Its Artesia refinery was the largest and one of the most modern in New Mexico (First Stip., par. 2a; Lackey Dep. 14–15). It had always made a profit despite price wars (First Stip., par. 20). While the government conceded that Malco may have needed a products pipeline in order to compete most effectively (Gov. Br. pp. 65–66), it disputed Continental's assertions that Malco could not have built such a pipeline. An engineering study made for the company concluded that such a project was entirely feasible (Con. Exh. 1 to Anderson and Lackey Dep.) and Mr. Anderson, Malco's president, testified that the company would have built such a pipeline had the company retained its refinery (Anderson Dep. 32).

The government conceded that Continental was faced with a supply problem because its principal

source of supply to the relevant market was its small, obsolete refinery at Artesia. However, Continental was a prosperous company with total assets of $700 million (Third Stip., par. 3) and net earnings of over $60,000,000 in 1959. It had the financial resources to build another refinery to meet its needs either at Artesia or at another location (App. 44, 64).

2. Viewed in the light most favorable to the government, this record establishes that Continental's acquisition of the Malco refinery and certain other assets has had or will have the following adverse effects upon competition. First, the acquisition accomplished a sizeable increase in the concentration of the New Mexico market gasoline. Continental, an integrated oil company accounting for 12.32 percent of the New Mexico market, eliminated Malco, an independent accounting for 12.08 percent of the market, giving it a combined figure of over 24 percent of the gasoline consumed (Gaffey Aff., table 2). This market was already a highly concentrated one with two suppliers accounting for 28 percent of all taxed sales [5] and the top five accounting for 58 percent (Gaffey Aff., table 5). After the acquisition, Continental on a projected basis, would account for 17 percent of taxed sales (moving from fourth to second); and the two leading companies would account for 34 percent of taxed sales; while the top five would account for 65 percent. The

[5] There are two sets of figures in the record: one being all taxed sales and sales to non-refiners; the other being gasoline consumed. One set is used here in stating the approximate share of the market held by each of the leading companies (taxed sales), while the other set shows Continental's and Malco's shares of total sales of gasoline consumed with more precision, but does not reveal the shares of other sellers.

increase in concentration by the two leading firms would be almost 21 percent, while the top five would achieve an increase in concentration of about 12 percent.

Second, the acquisition eliminated a major independent source of supply to independent gasoline marketers who sell at discount prices. The independent was taken over by a major gasoline company whose policy had always been to sell at the higher "branded" price level.

Third, following the acquisition, Continental caused Malco's jobbers to cut off sales to "rebranders" and to customers who would not increase their prices to a one-cent differential below the price charged by the major oil companies. Continental also caused other customers to be concerned over their source of supply of cut-price gasoline, and cut off a jobber who won a competitive bid for a long term gasoline supply contract. See, *supra*, pp. 13–15.

Fourth, the acquisition eliminated substantial competition between Continental and Malco in sales of gasoline to other refineries, in sales to jobbers and distributors and at the retail level where cut-price Malco stations throughout the State of New Mexico competed with nearby stations selling "Conoco" gasoline at higher prices.

The district court was required to accept these factual contentions of the government as true in determining whether Continental was entitled to summary judgment. *Poller* v. *Columbia Broadcasting*, 368 U.S. 464, 473. On this assumption, it is beyond question that the acquisition is proscribed by Section 7.

United States v. *Philadelphia National Bank*, 374 U.S. 321; *Brown Shoe Co.* v. *United States*, 370 U.S. 294. Nor could the acquisition be justified by the economic and competitive difficulties which, according to Continental, faced the two companies. Moreover, according to the government's evidence, each was capable of surmounting any physical handicaps (Malco's lack of a pipeline and Continental's antiquated refinery) without the acquisition. See, *supra*, pp. 15–17.

3. The government recognizes that Continental disputes these contentions and the facts upon which they rest. This, however, merely emphasizes that Continental's motion for summary judgment should have been denied. *Poller* v. *Columbia Broadcasting*, 368 U.S. 464, 467. Just last term in *White Motor Co.* v. *United States*, 372 U.S. 253, 264, this Court warned that to decide "whether a particular merger will tend 'substantially to lessen competition' * * * a trial rather than the use of summary judgment is normally necessary. *United States* v. *Diebold, Inc.*, 369 U.S. 654."

In granting summary judgment on this incomplete and contested record, presenting involved and complicated issues of fact and law, the district court effectively denied the government its day in court, barred it from developing its case and kept it from tendering its proof and challenging the proof of the defendants. *Sartor* v. *Arkansas Gas Corp.*, 321 U.S. 620. Indeed, this Court has many times pointed out that while summary judgment may be a salutary procedure in cases where issues are clear cut and simple, it

"presents a treacherous record for deciding issues of far flung import." *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 257.[6] While the disputed issues might be characterized as either issues of fact or mixed questions of law and fact, the Court need not attempt to distinguish between the two, for their resolution depends upon a choice of inferences to be drawn from certain underlying specific facts—which requires that a full trial be held. *United States* v. *Diebold, Inc.*, 369 U.S. 654; *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711.

4. The action of the district court is objectionable on still a further ground. The court rendered no opinion and entered neither findings of fact nor conclusions of law. Except for what is essentially a restatement of the words of Rule 56(c), the basis of its judgment is unexplained. Thus, this Court has no way of knowing what issues of fact the district court found to be in dispute but held immaterial (see Statement, *supra*, p. 8). The case presented literally hundreds of disputed facts bearing on the interrelated legal issues. To attempt to determine how the dis-

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[6] See *White Motor Co.* v. *United States*, *supra*, at 264; *United States* v. *Bethlehem Steel Corp.*, 157 F. Supp. 877, 879. As the Court stated in *Kennedy* v. *Silas Mason Co.*, *supra*, at 256, 257: "The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine. * * *

"We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. * * *"

trict court may have resolved these disputes and what law it applied to the facts would be a difficult task even after a trial. To attempt to do so now presents an impossible job of sorting through the voluminous documents, depositions and affidavits on which the contesting parties rely. Review in such a void is no review at all and affords an added reason why the judgment below should be reversed and a full trial ordered.

CONCLUSION

For the foregoing reasons, we respectfully submit that probable jurisdiction should be noted.

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FEBRUARY 1964.

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil No. 4763

UNITED STATES OF AMERICA, PLAINTIFF

v.

CONTINENTAL OIL COMPANY AND HONDO OIL AND GAS COMPANY, DEFENDANTS

ORDER AND JUDGMENT

The defendant Continental Oil Company having moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings, depositions and admissions on file in this action (including answers to interrogatories, stipulations of fact, stipulations as to documents and the exhibits), and the Court being fully advised by the very comprehensive briefs filed by both the plaintiff and the defendant Continental Oil Company, and the Court having determined that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law, it is

ORDERED that the motion of the defendant Continental Oil Company for summary judgment be, and the same hereby is, in all respects granted; and it is

ORDERED, ADJUDGED AND DECREED that the plaintiff have nothing by this action; that the Amended Complaint herein be, and the same hereby is, dismissed as

to both defendants; and that the defendants, Continental Oil Company and Hondo Oil and Gas Company, go hence without day.

Dated: September 27, 1963.

/s/ WALDO H. ROGERS
United States District Judge.

U. S. GOVERNMENT PRINTING OFFICE : 1964

Office-Supreme Court, U.S.
FILED
MAR 10 19
JOHN

No. 834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CONTINENTAL OIL COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

VINSON, ELKINS, WEEMS
& SEARLS
First City National
Bank Building
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No. 834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CONTINENTAL OIL COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

Appellee, Continental Oil Company, moves pursuant to Rule 16 of the Revised Rules of this Court:

First, to dismiss this appeal on the ground that Appellant deliberately failed to appeal as against a necessary and indispensable party — the defendant Hondo Oil and Gas Company—and thereby intentionally eliminated that party from this case.

Secondly, in the alternative, to affirm the judgment below on the ground that the questions on which decision of this cause depends are manifestly so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from a judgment entered on September 27, 1963, in the United States District Court for the District of New Mexico (WALDO H. ROGERS, J.).

That judgment (a) granted a motion by the defendant Continental Oil Company for summary judgment and (b) dismissed the plaintiff's Amended Complaint as to both Continental Oil Company and its co-defendant, Hondo Oil and Gas Company. This appeal has been taken, however, only as against Continental; the Notice of Appeal states explicitly:

> "that plaintiff United States of America hereby appeals to the Supreme Court of the United States from that part of the judgment entered in this action on September 27, 1963, granting defendant Continental Oil Company's Motion for Summary Judgment and dismissing the Complaint against it. *Plaintiff does not appeal from the judgment insofar as it dismisses the complaint against the defendant Hondo Oil and Gas Company.*
>
> "This appeal is taken pursuant to 15 U.S.C 29." (Emphasis supplied)

This action, filed in May 1961, attacked a business transaction which had been concluded two years earlier, on May 1, 1959, between Continental Oil Company ("Continental") and Malco Refineries, Inc. ("Malco"). The transaction consisted, essentially, of Continental's leasing of Malco's oil refinery at Artesia, New Mexico, for a term of 20 years. Asserting that the lease arrangement contravened the "anti-merger" provisions of Section 7 of the Clayton Act (15 U.S. Code § 18), Appellant prayed for a judgment compelling Continental to divest itself of the Malco refinery.

Shortly after the action was started, Continental moved, under Rules 19 and 21 of the Federal Rules of Civil Procedure, that Malco (which meanwhile had changed its name to Hondo Oil and Gas Company and which therefore is also sometimes referred to as "Hondo") be added as a party defendant. In support of such motion, Continental

pointed out that if divestiture were ultimately granted, as prayed for, Continental should in equity be relieved of its heavy burdens under the refinery lease.[1] Hence, it was essential that Hondo, the lessor, be brought in as a party to this action.

Despite opposition by Appellant's counsel,[2] Continental's motion to bring in Hondo was granted by order entered on September 18, 1961. Therein, the Court found "that Hondo Oil and Gas Company is a necessary party defendant" and directed that it be joined as such a party. This was done. Neither on the present appeal, nor otherwise, has Appellant ever sought review or reversal of the District Court's order of September 18, 1961, making Hondo a party defendant.

After two years of intensive effort on the part of counsel on both sides, the issues in this case were narrowed and the essential facts were established through interrogatories, depositions, productions of documents, stipulations of fact, and stipulations authenticating the numerous pertinent documents. A huge record was thus compiled.

Based on that record, Continental moved in July 1963 for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Both sides submitted voluminous briefs on the facts and the law.

---

[1] At that time, the lease remained 90% executory and called for future payment by Continental of annual rentals totaling some $6.3 million, together with all taxes and special assessments levied against the leased property.

[2] Such opposition was diametrically contrary to the position taken by Appellant's lawyers only a few months earlier in *United States* v. *Pabst Brewing Co.*, 183 F. Supp. 220 (D.C. Wis. 1960).

On September 24, 1963, Judge ROGERS notified counsel as follows:

> "After a study of the pleadings, stipulations and exhibits, together with the very comprehensive briefs filed by both the Government and the defendants, the Court is constrained to grant the defendants' Motion for Summary Judgment."

Accordingly, final judgment was entered three days later, on September 27, 1963. The dismissal of the Complaint as to Continental, the lessee, necessarily brought about a dismissal in favor of Hondo, the lessor; and, since the granting of any relief against Hondo was wholly dependent upon the granting of relief against Continental, *the judgment of dismissal was non-severable.*

Late on the 60th and last day on which an appeal could be taken, Appellant filed its Notice of Appeal.[3] In violation of the requirement in paragraph 1 of Rule 33 of the Revised Rules of this Court, the Notice of Appeal was sent from Albuquerque, New Mexico, to Continental's counsel at Houston, Texas — a distance of about 800 miles — via regular mail, rather than by air mail. As a consequence, the Notice was not actually received until December 2, 1963.

Be that as it may, when the Notice of Appeal finally arrived, it revealed that Appellant's lawyers had deliberately dropped Hondo out of the case. This maneuver, as we shall demonstrate, has backfired, because it necessitates a dismissal of the present appeal.

---

[3] The envelope transmitting the Notice of Appeal to counsel for Continental was postmarked 6:30 p.m., November 26, 1963.

I

ARGUMENT OF MOTION TO DISMISS

A. Hondo (formerly Malco) is a necessary and indispensable party to this cause

The whole purpose of this suit was to invalidate the refinery lease transaction of May 1, 1959, between Continental and Malco. The relief prayed for by Appellant was a judgment declaring the lease transaction unlawful and requiring Continental "to divest itself of all interest in and control over" the Malco refinery.[4]

---

[4] Appellant's prayer for relief, to the extent here material, reads as follows:

> "WHEREFORE, plaintiff prays:
>
> "1. That the acquisition by Continental . . . of the assets and business of Malco be adjudged to be in violation of Section 7 of the Clayton Act;
>
> "2. That . . . Continental be required to establish a new corporation and to transfer to said new corporation all of the business and assets acquired by Continental . . . from Malco; that Continental be specifically required to assign to said new corporation such rights as it acquired under that certain lease agreement of May 1, 1959, pertaining to . . . the refinery of Malco located at Artesia, New Mexico; and that Continental divest itself of all interest in or control over said new corporation . . . "

The relief sought is a determinative factor for purposes of ascertaining who are necessary or indispensable parties to an action. *Barney* v. *Baltimore*, 6 Wall. 280, 284 (1868); *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199, 235 (1902); *State of Washington* v. *United States*, 87 F. 2d 421, 426 (9th Cir. 1936); *Metropolis Theatre Co.* v. *Barkhausen*, 170 F. 2d 483, 485 (7th Cir. 1948); cert. den. 336 U.S. 945; *Young* v. *Powell*, 179 F. 2d 147, 151-152 (5th Cir. 1950); cert. den. 339 U.S. 948; *Baton* v. *Nona-Fletcher Mineral Co.*, 198 F. 2d 629, 631 (5th Cir. 1952); cert. den. 344 U.S. 864; *Pioche Mines Consol.* v. *Fidelity-Philadelphia Trust Co.*, 202 F. 2d 944, 948 (9th Cir. 1953); cert. den. 346 U.S. 899.

If any such relief were to be granted, equity and good conscience would dictate that Continental be relieved of its heavy obligations under the refinery lease, which now remains 75% executory and has 15 more years to run — until May 1, 1979. In addition to obligating Continental to pay future taxes levied against the refinery property, the lease calls for payment by Continental of future annual rentals totaling about $5 million. Under the circumstances, it would be wholly inequitable and unconscionable to force Continental to divest itself of the refinery and still keep Continental liable for millions of dollars in rentals and taxes on the very property which Continental would be forbidden to hold and enjoy.

Thus, the relief prayed for by Appellant would perforce require a cancellation or reformation of the Continental-Malco lease agreement of May 1, 1959. In order to grant any such relief, however, the court must have before it both parties to the lease — the lessor (Malco, now Hondo), as well as the lessee (Continental).

Legion are the reported cases which hold that in any action wherein a contract is sought to be cancelled or reformed, or wherein the validity of a contract is otherwise to be passed upon or affected, all parties to the contract are "necessary" or "indispensable" parties.

The leading case is *Shields* v. *Barrow*, 17 How. 130 (1855). This Court there pointed out that parties to a suit may be classified as "proper," "necessary" or "indispensable." The "necessary" parties were defined as follows (at p. 139):

> "Persons having an interest in the controversy, and who ought to be made parties, in order that the court may . . . . finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it."

Then followed this classic definition and statement of the rule respecting "indispensable" parties (at pp. 139-140):

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.
>
> "A bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition as to others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties."[5]

East Tennessee, V. & G. R. Co. v. *Grayson*, 119 U.S. 240 (1886), involved a 20-year lease which the plaintiff

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[5] The *Shields* v. *Barrow* definitions of "necessary" and "indispensable" parties have been quoted or paraphrased in scores of subsequent cases. In addition to those cited in the text of this point A, see the following: *Barney* v. *Baltimore*, 6 Wall. 280, 284 (1868); *Williams* v. *Bankhead*, 19 Wall. 563, 571 (1874); *California* v. *Southern Pacific Co.*, 157 U.S. 229, 249-251 (1895); *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199, 235-236 (1902); *Garzot* v. *Rios de Rubio*, 209 U.S. 283, 297-298 (1908); *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 48-49 (1908); *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U.S. 77, 80 (1920); *Lumbermen's Mut. Cas. Co.* v. *Elbert*, 348 U. S. 48, 52 (1954); *State of Washington* v. *United States*, 87 F. 2d 421, 425-426 (9th Cir. 1936); *Baird* v. *Peoples Bank & Trust Co.*, 120 F. 2d 1001, 1003 (3rd Cir. 1941); *Bry-Man's, Inc.* v. *Stute*, 312 F. 2d 585, 586-587 (5th Cir. 1963).

attacked without joining the lessor as a party to the suit — the precise situation we now have in the case at bar. This Court held (at p. 244):

> "The principal purpose of the suit is to set aside the lease for want of authority to make it. For that purpose both the lessor and the lessee are necessary parties."

In *Gregory* v. *Stetson*, 133 U.S. 579 (1890), this Court said (at p. 586):

> "In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that a court cannot adjudicate directly upon a person's right without having him either actively or constructively before it. This principle is fundamental."

Lee v. *Lehigh Valley Coal Co.*, 267 U.S. 542 (1925), involved a suit brought by one of two lessors against the Coal Company lessee for construction of the lease. In an opinion by Mr. Justice HOLMES, this Court held (at p. 543) that the absent lessor "obviously . . . . was a 'necessary' even if not an indispensable party."

In *Roos* v. *Texas Co.*, 23 F. 2d 171 (2nd Cir. 1927); cert. den. 277 U.S. 589, Judge LEARNED HAND observed (23 F. 2d at p. 172):

> "Rescission of a contract, or declaration of its invalidity, as to some of the parties, but not as to others, is not generally permitted."

To the same effect: *Warfield* v. *Marks*, 190 F. 2d 178, 180 (5th Cir. 1951); cert. den. 343 U.S. 887; *Ward* v. *Deavers*, 203 F. 2d 72, 75 (D.C. Cir. 1953).

In *Von Herberg* v. *City of Seattle*, 27 F. 2d 457 (9th Cir. 1928); cert. den. 278 U.S. 644, the Court said (27 F. 2d at p. 461):

> "The object of that suit was the annulment of a contract between the city and the power company, and on principle and authority it would seem that both contracting parties were necessary parties to any suit having that object in view. . . .
>
> ". . . . the suit to annul the contract, whether brought against one or the other of the contracting parties, or against both, presented but a single issue, and there was in the nature of things no separable controversy as to each party."

The opinion in *Green* v. *Brophy*, 110 F. 2d 539 (D.C. Cir. 1940), was written by Judge (later Chief Justice) VINSON and included this statement of the rule (at pp. 541-542):

> ". . . . litigation requiring decision as to the legal consequences to be attached to a relationship where only one party thereto is made a party to the action is perhaps the clearest case of failure to join an indispensable party."

In *Calcote* v. *Texas Pac. Coal & Oil Co.*, 157 F. 2d 216 (5th Cir. 1946); cert. den. 329 U.S. 782; rehearing den. 329 U.S. 830, the Court said (157 F. 2d at p. 219):

> "The leasing contract was an entirety, and from its nature could not be cancelled as to the Calcotes and allowed to stand as to the other royalty owners."

In *Metropolis Theatre Co.* v. *Barkhausen*, 170 F. 2d 481 (7th Cir. 1948); cert. den. 336 U.S. 945, suit was brought for cancellation of a ground lease. Thompson, the lessor of part of the property on which a single building had been erected, was not joined in the action. The Court held (170 F. 2d at p. 486):

> "The interest of Thompson cannot be said to be distinct and severable from that of plaintiff. If plaintiff is successful in this litigation the interest of Thompson

> will be vitally affected. In the absence of Thompson a decree cannot be entered consistent with equity and good conscience.
>
> "It is our judgment that the Thompson interests are indispensable parties. . . ."

In *Hudson* v. *Newell*, 172 F. 2d 848 (5th Cir. 1949), the Court said (at p. 852):

> "We know of no exception to the rule that an instrument cannot be destroyed totally by a decree unless all parties to it . . . . are before the court."

To the same effect: *Young* v. *Powell*, 179 F. 2d 147, 151 (5th Cir. 1950); cert. den. 339 U.S. 948.

In *Interstate Commerce Commission* v. *Blue Diamond Products Co.*, 192 F. 2d 43 (8th Cir. 1951), a Federal regulatory agency was seeking an injunction which would have had the effect of nullifying leases and contracts with parties who were not parties to the suit. The Court held (at p. 47):

> "An injunction here against the defendant could only be granted on the theory that the various leases and contracts are void. Certainly these parties have a very substantial interest in that question and we conclude that they are indispensable parties."

In *Baten* v. *Nona-Fletcher Mineral Co.*, 198 F. 2d 629 (5th Cir. 1952); cert. den. 344 U.S. 864, the Court said (198 F. 2d at p. 631):

> "The primary relief sought — cancellation of the deeds — will, if granted, directly and injuriously affect the rights of the grantees in said deeds. These grantees are therefore indispensable parties. . . ."

In *Tucker* v. *National Linen Service Corp.*, 200 F. 2d 858 (5th Cir. 1953); cert. den. 346 U.S. 817, the Court said (200 F. 2d at p. 863):

"Whatever of uncertainty, of confusion, or of difficulty, may at any time have attended the statement of the principle of indispensability or its application to particular facts, one thing is clearly settled with respect thereto. This is that, where cancellation, reformation, or other equitable relief in respect of a contract or other instrument evidencing a right or a claim is sought, all of those having or asserting an interest in the contract or instrument, or who will be affected by the decree, are indispensable parties and must be before the court."

See, also:

Ribon v. *Chicago, R.I. & P.R. Co.*, 16 Wall. 446, 450 (1873);

Commonwealth Trust Co. v. *Smith*, 266 U.S. 152 (1924);

Arkansas Southeastern R. Co. v. *Union Sawmill Co.*, 154 Fed. 304, 310-311 (5th Cir. 1907);

South Penn Oil Co. v. *Miller*, 175 Fed. 729, 736 (4th Cir. 1909);

Vincent Oil Co. v. *Gulf Refining Co.*, 195 Fed. 434, 436-437 (5th Cir. 1912);

Associated Oil Co. v. *Miller*, 269 Fed. 16, 20-21 (5th Cir. 1920); cert. den. 256 U.S. 697;

Egyptian Novaculite Co. v. *Stevenson*, 8 F. 2d 576, 580-581 (8th Cir. 1925);

Flynn v. *Brooks*, 105 F. 2d 766, 767 (D.C. Cir. 1939);

Kentucky Natural Gas Corp. v. *Duggins*, 165 F. 2d 1011, 1015-1016 (6th Cir. 1948);

Lawrence v. *Sun Oil Co.*, 166 F. 2d 466, 469-470 (5th Cir. 1948);

Pioche Mines Consol. v. *Fidelity-Philadelphia Trust Co.*, 202 F. 2d 944, 947-948 (9th Cir. 1953); cert. den. 346 U.S. 899;

Brodsky v. *Perth Amboy National Bank*, 259 F. 2d 705, 707 (3rd Cir. 1958);

McShan v. *Sherrill*, 283 F. 2d 462, 464 (9th Cir. 1960).

Continental's motion to have Hondo joined as a party defendant in the case at bar was based upon Rule 19 of the Federal Rules of Civil Procedure. That Rule, entitled "Necessary Joinder of Parties," has been in effect since September 1938, but it was simply declaratory of the prior law, and hence effected no change in the requirements for joinder of "necessary" and "indispensable" parties. *Young* v. *Garrett*, 149 F. 2d 223, 228 (8th Cir. 1945); *Wesson* v. *Crain*, 165 F. 2d 6, 8 (8th Cir. 1948); *Metropolis Theatre Co.* v. *Barkhausen*, 170 F. 2d 481, 484 (7th Cir. 1948); cert. den. 336 U.S. 945; *Order of Railroad Tel.* v. *New Orleans, Texas & M.Ry. Co.*, 229 F. 2d 59, 67 (8th Cir. 1956); cert. den. 350 U.S. 997.

Subdivision (a) of Rule 19 requires joinder of "persons having a joint interest," and Subdivision (b) provides, in relevant part, as follows:

> "When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action."

Hondo was subject to the jurisdiction of the court below as to both service of process and venue and could be, and was, made a party to this action without depriving the

court of jurisdiction over Appellant and Continental. Accordingly, even if Hondo be regarded as merely a "necessary" party, rather than an "indispensable" one, its joinder herein, as ordered by the court below was mandatory. *United States* v. *Aetna Cas. & S. Co.*, 338 U.S. 366, 381-382 (1949); *Samuel Goldwyn, Inc.* v. *United Artists Corp.*, 113 F. 2d 703, 707 (3rd Cir. 1940).

B. Nonjoinder of an available "necessary" party or of any "indispensable" party requires dismissal of the suit

Where a plaintiff fails or refuses to join an available "necessary" party or any "indispensable" party, the suit must be dismissed. Of the numerous Federal appellate cases so holding, the following are representative:

Ribon v. *Chicago, R.I. & P.R. Co.*, 16 Wall. 446 (1873), a suit to annul a sale of property, where this Court said (at p. 450):

> "The rule in equity as to parties defendant is, that all whose interests will be affected by the decree sought to be obtained must be before the court; and if any such persons cannot be reached by process . . . . the bill must be dismissed. Where a decree can be made as to those present, without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and of those absent are inseparable, the obstacle is insuperable."

Williams v. *Bankhead*, 19 Wall. 563 (1874), where this Court said (at p. 571):

> "The general rule as to parties in chancery is, that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. . . . The true distinction appears to be as follows: First. Where a person will be directly affected by a decree, he is an indispensable party. . . . Second.

> Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached."

Swan Land & Cattle Co. v. *Frank*, 148 U.S. 603 (1893), where this Court announced (at p. 611):

> "The general rule that suits in equity cannot be entertained and decrees be rendered, when necessary or indispensable parties, whether corporations or individuals, are not brought before the court. . . ."

Minnesota v. *Northern Securities Co.*, 184 U.S. 199 (1902), where this Court said (at p. 235):

> "The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject matter who are not made parties to the suit is founded upon clear reasons, and may be enforced by the court, *sua sponte*. . . ."

To the same effect: *Garzot* v. *Rios de Rubio*, 209 U.S. 283, 297 (1908).

Commonwealth Trust Co. v. *Smith*, 266 U.S. 152 (1924), where this Court affirmed a judgment of dismissal, saying (at p. 159):

> "But, as the bill was dismissed because of the refusal to bring in additional parties, the only question open here is whether the parties indicated were necessary parties. Of course they were, if they had such an interest in the matter in controversy that it could not be determined without either affecting that interest or leaving the interests of those who were before the court in a situation that might be embarrassing and inconsistent with equity."

To the same effect: *Interstate Commerce Commission* v. *Blue Diamond Products Co.*, 192 F. 2d 43, 46-47 (8th Cir. 1951).

Calcote v. *Texas Pac. Coal & Oil Co.*, 157 F. 2d 216 (5th Cir. 1946); cert. den. 329 U.S. 782; rehearing den. 329 U.S. 830, where the Court said (157 F. 2d at p. 225):

> ". . . . every indispensable party must be brought into court, actually or constructively, or the suit will be dismissed if a substantial claim is stated in the complaint."

Order of Railroad Tel. v. *New Orleans, Texas & M. Ry. Co.*, 229 F. 2d 59 (8th Cir. 1956); cert. den. 350 U.S. 997, where the Court held (229 F. 2d at p. 67):

> "We confine our decision on the question of necessary parties to the holding that the judgment of dismissal of the plaintiff's case was justified by the lack of indispensable parties defendant. . . ."

C. Failure to appeal as against a necessary or indispensable opposing party requires dismissal of the appeal

Judge (later Justice) VAN DEVANTER, writing for the Court in *Gray* v. *Grand Forks Mercantile Co.*, 138 Fed. 344 (8th Cir. 1905) began his opinion with these observations (at p. 345):

> "The principle that a court cannot directly adjudicate the rights of a person who is not before it is fundamental (*Gregory* v. *Stetson*, 133 U.S. 579, 10 Sup. Ct. 422, 33 L. Ed. 792), and is as applicable to courts exercising appellate jurisdiction as to those whose jurisdiction is original (*Terry* v. *Abraham*, 95 U.S. 38, 23 L. Ed. 794; *Davis* v. *Mercantile Co.*, 152 U.S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563. . . .)."

In *Davis* v. *Mercantile Trust Co.*, 152 U.S. 590 (1894), the appeal to this Court was taken from a decree foreclosing a mortgage, without joining the mortgagor. In dismissing the appeal for that reason, this Court said (at pp. 595-596):

> "Ordinarily it may be presumed that all the parties to the record are interested, and so it is often said that all such parties must be joined as appellants or appellees. . . .; but it is unnecessary to rest this case upon the mere fact that the mortgagor in this case was a party to the record — the only defendant in the first instance. It was not only such a party, but is also one directly and vitally interested in the question whether the decree of foreclosure and sale shall stand, and yet it is not before us. . . . [W]hile the citation on its face runs to all the parties to the record, it was not served on the mortgagor . . . . and that company has never been brought into this court, and never entered an appearance here. This is fatal to the appeal. . . . [A]s that mortgagor was interested in and affected by the decree of foreclosure and sale it should have been made a party to this appeal and brought into this court, and because of the failure so to do the appeal cannot be maintained."

This conclusion is in consonance with the general rule that it is the duty of an appellate court to protect the interests of absent indispensable parties, even though the defect of parties was not raised in the court below. *Hooey* v. *Wilson*, 9 Wall. 501 (1870); *Flynn* v. *Brooks*, 105 F. 2d 766, 767-768 (D.C. Cir. 1939); *Brown* v. *Christman*, 126 F. 2d 525, 532 (D.C. Cir. 1942); *McShan* v. *Sherrill*, 283 F. 2d 462, 464 (9th Cir. 1960).

In a leading case on this subject, *Malsby* v. *Shipp*, 177 Ga. 54, 169 S.E. 308 (1933), the Supreme Court of Georgia dealt as follows with a situation strikingly similar to the one presented in the case at bar:

"1. All parties who are interested in sustaining the judgment of the court below, or who would be affected by a judgment of reversal, are indispensable parties in the Supreme Court. . . .

"2. Where an action is instituted seeking substantial relief against several defendants, and one of them files a demurrer which goes to the substance of the whole petition and challenges the plaintiff's right to any relief, a judgment sustaining such demurrer inures to the benefit of all the defendants, and they become interested in sustaining the judgment; and if the plaintiff desires to except to the ruling, it is essential that he make all of the defendants in the trial court defendants in error. . . .'

* * *

"4. In the present case, the plaintiff sought to obtain a money judgment and also an injunction against one of the defendants, called the main defendant, and prayed for injunction and other relief against other defendants; but it appeared from the allegations that the plaintiff could in no event be entitled to such injunctive relief against the other defendants, unless he had a cause of action against the 'main defendant.' The court sustained a general demurrer filed by that defendant, dismissing the petition as to him, and the plaintiff excepted but did not make the other defendants parties to the bill of exceptions. Held: All of the defendants in the court below against whom the plaintiff sought the writ of injunction were directly interested in sustaining the judgment complained of, and were indispensable parties in the Supreme Court; and, since these defendants were not made parties to the bill of exceptions, the writ of error must be dismissed."

D. By deliberately failing to appeal as against Hondo, Appellant not only dropped a necessary and indispensable party from the appeal but eliminated that party from all future proceedings in this case

The situation created by Appellant's strange appellate tactics in the case at bar is analagous to the situation involved in *Re Metropolitan Trust Co.*, 218 U.S. 312 (1910). There, the defendant trust company had successfully demurred to the complainant's bill and had accordingly been dismissed from the case. Later, after trial, a final decree of dismissal was entered in favor of the other defendants (167 Fed. 145). Complainant appealed from that decree, but not from the earlier one dismissing the trust company. The Circuit Court of Appeals reversed the judgment in favor of the other defendants on jurisdictional grounds and directed that the cause be remanded to the state court (176 Fed. 333). Thereafter, the complainant moved to vacate the dismissal which the trust company had won, so that it might be vouched back into the litigation as a defendant. The granting of such motion (180 Fed. 950) was held by this Court to be beyond the lower court's jurisdiction. Following are excerpts from this Court's opinion (218 U.S. at pp. 320-321):

> "When, after final decree dismissing the bill as against the other defendants, the complainant appealed to the circuit court of appeals, the decree in favor of the trust company was not brought before the appellate court for review, and the trust company was not a party to the appeal.
>
> "The decision of the circuit court of appeals, in reversing the final decree and in directing the remand

to the state court, was, of course, subject to the necessary limitation that it could apply only to the parties who had been brought before that court . . . .

". . . . After the term had expired, and after the complainant had exercised his right of appeal . . . . it was sought to set aside a decree which stood unreversed, and by which the trust company had been dismissed from the cause.

". . . . The reversal by the circuit court of appeals of the final decree as to the other defendants, and its direction to remand, did not make the decision of the court of first instance any the less 'a judicial act, and within the scope of its jurisdiction and discretion'; and as that reversal and direction did not affect the trust company, the decree in its favor remained in full force."

So, in the case at bar, if there should now be a remand of this cause to the court below for further proceedings, it would seem that Hondo could not be brought back in as a party defendant. The judgment of dismissal in Hondo's favor would, under the doctrine of *Metropolitan Trust Co., supra*, stand "unreversed" (and perhaps unreversable) and hence would "remain in full force." Accordingly, Appellant's dropping Hondo out of this appeal — and hence out of this case — has produced the following intolerable consequences:

First: Appellant's maneuver has nullified the District Court's order of September 18, 1961, which correctly held Hondo to be a necessary party defendant in this action. Such nullification amounted to reversal of the District Court's order without appealing therefrom and without judicial sanction of any kind. Appellant's lawyers simply took the law into their own hands and eased Hondo out

of the case, in contravention of all the applicable authorities and also in defiance of the explicit order of the court below.[6]

A second consequence of Appellant's unique procedural experiment is that the District Court has thereby been stripped of the discretionary authority it would otherwise possess to frame a fair and equitable judgment of divestiture.[7] Ordinarily, in the framing of equitable decrees in antitrust actions, the District Courts are clothed "with

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[6] Why Appellant's lawyers have from the outset been opposed to Hondo's joinder in this case remains a mystery. Their position here is just the opposite of that taken by them in *United States v. Pabst Brewing Co.*, 183 F. Supp. 220 (D.C., Wis. 1960). There, the seliers of assets were joined as original parties defendant, along with the purchaser, in a divestiture suit brought under Sec. 7 of the Clayton Act. When the seller-defendants moved to be dropped from the case, Appellant's lawyers succeeded in defeating the motion and in persuading the Court to rule as follows (at pp. 221-222):

> "The Government concedes that the movants have been charged with no offense, but contends that they are proper parties to this proceeding for the purposes of relief.
>
> "In a proceeding under § 7 of the Clayton Act, the court has authority to grant relief not only against parties who are found to have violated that section, but also against other parties if such relief is necessary to eliminate the effect of an acquisition offensive to the statute . . . All parties against whom relief may be granted may properly be joined as parties defendant.
>
> ". . . Because of the movants' close connection with the transaction here complained of, it is our opinion that, should the plaintiff prevail, some relief might be granted against them, and that they should be retained as parties pending determination of the relief, if any, to be granted."

[7] Assuming — but of course not conceding — that such a judgment can somehow be justified in this case. As we show in support of our alternative motion to affirm (*infra*, pp. 25 et seq.), this action is completely lacking in merit and the judgment of dismissal entered in the court below was eminently correct.

large discretion to model their judgments to fit the exigencies of the particular case." *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401 (1947); *United States* v. *du Pont de Nemours & Co.*, 353 U.S. 586, 607-608 (1957). But the exercise of such "large discretion" in the case at bar has now been frustrated. In the absence of Hondo, its interest may not be adversely affected by the final decree herein, because "no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court." *Mallow* v. *Hinde*, 12 Wheat. 193, 198 (1827); *Shields* v. *Barrow*, 17 How. 130, 141 (1855); *Barney* v. *Baltimore*, 6 Wall. 280, 285-286 (1868); *Gregory* v. *Stetson*, 133 U.S. 579, 586 (1890); *California* v. *Southern Pacific Co.*, 157 U.S. 229, 249 (1895); *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199, 237 (1902); *Bogart* v. *Southern Pacific Co.*, 228 U.S. 137, 146 (1913). At the same time, no just and reasonable decree of divestiture can be entered herein unless it *does* adversely affect Hondo's interest by cancelling or reforming the refinery lease agreement. Otherwise, Continental would be ousted from possession and enjoyment of the Malco refinery, but would still remain liable, as lessee, for millions of dollars in rentals and taxes upon the divested refinery property. Thus, Appellant's dropping of Hondo has deprived the District Court of authority and discretion to decree divestiture — the only relief specifically prayed for — "without either affecting that interest [of the absent Hondo], or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields* v. *Barrow*, *supra*, 17 How. at p. 139.

A third consequence — and likely the intended one — is that Continental is exposed to unmerciful amercement. A decree of divestiture, with no protection against Hondo's

claims under the refinery lease, would place Continental at a tremendous disadvantage. Continental could not then safely obey the decree. Moreover, further litigation between Continental and Hondo would be necessary in order to determine the extent of Continental's liability, if any, under the refinery lease after forced divestiture of the property.

The rule requiring joinder of necessary and indispensable parties is designed to prevent just such shockingly inequitable conditions. In *California* v. *Southern Pacific Co.*, 157 U.S. 229 (1895), this Court approved the following statement of the reasons for the rule (at p. 251):

> "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, *so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation.* For this purpose all persons materially interested in the subject, ought generally . . . . to be made parties to the suit . . . ." (emphasis added)

To the same effect: *Arkansas Southeastern R. Co.* v. *Union Sawmill Co.*, 154 Fed. 304, 311 (5th Cir. 1907); *Vincent Oil Co.* v. *Gulf Refining Co.*, 195 Fed. 434, 436 (5th Cir. 1912).

The half-appeal Appellant has attempted here is not simply unauthorized by statute or rule of court; it clearly disobeys the District Court's order requiring the joinder of Hondo and disregards the basic principles of equity making such joinder mandatory. By deliberately failing to appeal as against Hondo, Appellant has intentionally eliminated a necessary and indispensable party, in whose absence further proceedings in this case would be futile. The appeal must, therefore, be dismissed.

II

ARGUMENT OF MOTION TO AFFIRM

A. There was but one, simple issue in the case

To the extent applicable here, Section 7 of the Clayton Act (15 U.S. Code § 18) reads as follows:

> ". . . . no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly."

Six of the seven ultimate issues arising in this case under the foregoing statutory language were resolved, either by concession of the parties or by Judge ROGERS' rulings in the Order on Pre-Trial Hearing, entered July 17, 1963. Thus:

1. Beyond question, Continental and Malco were corporations, the first subject to FTC jurisdiction and the second engaged also in commerce.

2. Continental conceded that its 20-year lease of the Malco refinery, with an option to purchase it at the end of the lease terms, constituted an "acquisition."

3. The Government conceded that Continental's taking over of a lease on one service station at Roswell, New Mexico — the only retail outlet controlled or operated by Malco — was *de minimis*, and that no issue was raised in regard to the acquisition of that single service station (Pre-Trial Tr. pp. 20, 27).[5]

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[5] The reference on page 4 of Appellant's Jurisdictional Statement to Continental's purchase of "marketing facilities" is therefore quite misleading. The only "marketing facilities" Continental acquired from Malco consisted of the one service station at Roswell; and that acquisition was concededly *de minimis*.

4. Although the Amended Complaint made both gasoline and crude oil "lines of commerce" involved here, the averments respecting crude oil turned out to be completely unfounded. The parties therefore stipulated "that any and all issues tendered by the pleadings herein with respect to crude oil as a line of commerce are hereby eliminated from this case" (Stipulation Narrowing Issues, dated December 20, 1962; Pre-Trial Tr. pp. 9, 19-20, 37). That left *gasoline* as the sole "line of commerce" to be considered, as both sides agreed (Pre-Trial Tr. pp. 9, 14, 24).

5. The "section of the country" (also referred to as the "relevant geographic market" or the "relevant market area") was the main topic of debate at the pre-trial hearing on July 10 and 11, 1963. The Government adhered to the position taken in its Amended Complaint — that the "relevant geographic market" should be confined to the political boundaries of New Mexico.[9] The undisputed facts of record, however, established that sizeable volumes of gasoline manufactured at the Malco refinery at Artesia, New Mexico, were shipped to, and distributed in, Arizona and El Paso County, Texas. (See Pre-Trial Tr. pp. 20-26, 32-35.) Accordingly, Judge Rogers properly concluded, and held, that for purposes of this cause the "relevant market area" should include El Paso County and most of Arizona, as well as New Mexico (Pre-Trial Tr. pp. 93-94, 102-103; Order on Pre-Trial Hearing, par. (1)).

6. The Government never contended that Continental's acquisition of the Malco refinery could conceivably "tend to create a monopoly." (See Pre-Trial Tr. p. 18.)

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[9] In taking this stand, the Government's obvious motive was simply to blow up and distort Continental's and Malco's relative refining and marketing percentages. (See Pre-Trial Tr. pp. 25-26.) Such percentages for the entire relevant market area were miniscule; and, as we shall later show (*post*, pp. 26-28), such percentages for New Mexico alone were themselves far too small to signify any "*substantial* lessening of competition."

7. Thus, the one basic, ultimate issue left open for determination in this case was whether Continental's "acquisition of the assets of Malco Refineries, Inc., in May of 1959, including the manufacturing facility at Artesia, New Mexico, the name 'Malco,' and the good will of Malco . . . . may constitute a substantial lessening of competition in the relevant market" (Order on Pre-Trial Hearing, par (3)).[10]

B. The essential allegations of the Amended Complaint were proved false by undisputed facts of record

The evidentiary record in this case was developed, through the cooperative efforts of counsel on both sides over a period of 21 months, in the following ways:

— Appellant propounded two sets of searching interrogatories, which Continental answered in detail.

— At Appellant's instance, oral depositions were taken of eight witnesses, the transcripts of whose testimony covers approximately 750 pages.[11]

— Four stipulations of fact were entered into, comprising some 80 pages of statistical and other pertinent information.

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[10] Appellant's Jurisdictional Statement characterizes the action at bar as "a complicated antitrust case" (p. 8), "presenting involved and complicated issues of fact and law" (p. 19). But Appellant's trial counsel assured the court below that "in this case, I believe we have a relatively simple case in that we don't have a great number of products involved" (Pre-Trial Tr. p. 9), and that, because so many facts had been stipulated, "our issues are going to be more limited" (Id. p. 17).

[11] The witnesses consisted of the president, the vice president and the former sales manager of Malco (the latter having since May 1, 1959, continued to supervise all sales to Malco customers as president of Continental's subsidiary, Malco Products, Inc.) and two vice presidents and three other key officials of Continental.

— There were produced from the files of Malco and Continental a total of 141 documents (several of them quite voluminous) pertaining to the matters in suit. Two stipulations were entered into authenticating these documents and assigning exhibit numbers to them.

The facts so made of record were undisputed and, indeed, indisputable. Moreover, they made the granting of Continental's motion for summary judgment inevitable, for they demolished every allegation in the Amended Complaint which was essential to the sustaining of Appellant's cause of action. Set forth below are summaries of those allegations and of the undisputed facts which disproved them.

1. *Refinery capacities*

Allegations: In 1959 Continental's refinery at Artesia, with an input capacity of 4,000 barrels per day, represented 13% of the total refining capacity in New Mexico, and Malco's Artesia refinery with a capacity of 12,000 barrels daily, represented 40% of such total. (Am. Comp. par. 14)[12] Thus, the impression was sought to be created that by acquiring the Malco refinery, Continental became the dominant refiner serving the New Mexico market.

Undisputed Facts: Continental's little Artesia refinery was old and obsolete and had reached a point where it would soon have to be shut down (ID 4, memo. p. 2; ID 6, pp. 1, 2; Liddell Dep. pp. 9-10, 12-13, 163-164, 175; Sullivan Dep. p. 11; Lovejoy Dep. pp. 64-65). At least 18 refineries, having an aggregate input capacity of approximately 300,000 barrels a day, were supplying New Mexico, and over 30 refineries, with almost 1,075,000 barrels of daily capacity,

[12] These same meaningless and misleading percentages are repeated on page 4 of Appellant's Jurisdictional Statement.

were supplying the relevant market area (1st Stip. of Facts, pars. 2(a), 2(b), 2(c)). Accordingly, Continental's 4,000-barrel plant at Artesia represented 1.84% of the total refining capacity serving New Mexico and only 0.37% of such capacity feeding into the relevant market area. By the same token, Malco's 11,500-barrel plant (the correct figure) represented 3.84% of the refining capacity supplying New Mexico and but 1.07% of such capacity serving the relevant market area.[13]

2. *So-called "market shares"*

Allegations: In 1958, Continental's sales of gasoline to be marketed in New Mexico under the "Conoco" brand equaled about 10% of the total gasoline consumption in that State (Am. Comp. pars. 15, 16). The 1958 Malco sales of gasoline to be marketed in New Mexico under the "Malco" brand equaled about 11.5% of the total State consumption (Am. Comp. par. 18).

Undisputed Facts: The actual 1958 percentages of total consumption marketed under the "Conoco" and "Malco" brands were as follows:

Area	"Conoco"	"Malco"
New Mexico	9.63	6.20
Arizona	0.29	3.04
El Paso Co., Texas	2.66	3.12
Relevant Market	4.30	4.30

(1st Stip. of Facts pars. 1, 10, 12, 19)

[13] In *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), the manufacturing facilities involved represented less than 0.5% for Kinney and about 4% for Brown (370 U.S. at pp. 298, 303). The Government took no appeal from the District Court's finding "that the merger of Brown's and Kinney's *manufacturing* facilities was economically too insignificant to come within the prohibitions of the Clayton Act" (370 U.S. at p. 335).

In truth, however, Malco possessed no measurable "share" of the gasoline market in any of the areas above listed. Malco sold virtually all of its gasoline f.o.b. its Artesia refinery (1st Stip. of Facts, par. 14). Having no supply contracts with any of its customers, Malco could not, and did not, exercise any control over the disposition of the gasoline so sold or over the outlets through which such gasoline was marketed (Lackey Dep. p. 24; Copple Dep. pp. 10, 13-14, 41; ID 96, p. 3). Aside, therefore, from the relatively insignificant gallonage dispensed through its solitary service station at Roswell, Malco had no "market share" whatever.

3. *"Malco" jobbers and retail outlets*

Allegations: In 1958, gasoline sold by Malco in New Mexico went to more than 50 jobbers who, in turn, sold the product to more than 200 service stations for resale to the public (Am. Comp. pars. 19, 21).

Undisputed Facts: At the time of the refinery lease transaction of May 1, 1959, Malco's regular jobber customers comprised 39 in New Mexico, 3 in Arizona, and 1 in El Paso County, Texas, and those jobbers operated or supplied a total of 109 retail outlets in New Mexico, 64 in Arizona, and 4 in El Paso County (1st Stip. of Facts, par. 18).

4. *Retail prices for "Conoco" gasoline*

Allegations: Most service stations (187 out of 233) handling "Conoco" gasoline in New Mexico purchased such gasoline from Continental under contracts which compelled the retailing of the product "at prices determined by Continental"; and those prices "were the same as the

retail prices at which other "majors" brands of gasoline were being sold in competing stations" (Am. Comp. pars. 16, 17).[14]

Undisputed Facts: The contracts allegedly enabling Continental to control the retail price of gasoline were pure fiction; no such contracts existed. (See ID 1; ID 97, IDs 102-109.) The retail prices of both "major" and "independent" brands of gasoline varied from station to station and fluctuated from time to time, depending upon local competitive conditions and individual retailers' postings (Liddell Dep. pp. 52-53; Swanson Dep. pp. 16-18, 21-22; Frost Dep. pp. 19-26; Sullivan Dep. pp. 48, 52, 54, 76-77; Copple Dep. pp. 36-40, 59-61, 72-73, 87; IDs 91, 110-141; Answers to Interrogatories (1st Set) Nos. 18, 19(d)).

5. *Dependence of "Malco" jobbers and service stations on Malco refinery as supply source*

Allegations: Malco's New Mexico jobbers, and the service stations buying from those jobbers, "depended on Malco as a source of supply of gasoline to enable them to continue in business and to compete with the distributors and service stations handling gasoline under brand names of major oil companies, including defendant 'Continental'" (Am. Comp. par. 21).

Undisputed Facts: Malco had no supply contracts with any of its gasoline customers (Lackey Dep. pp. 21, 64, 134-135; Copple Dep. p. 17; ID 26, p. 1; ID 96, p. 3). They were free to, and frequently did, buy their gasoline requirements from other refineries (1st Stip. of Facts, par.

[14] Five other "major" brands were alleged (Am. Comp. par. 17). Actually, there were 11 other "majors" and 12 other integrated oil companies marketing in New Mexico in 1958 (1st Stip. of Facts par. 7(a)), not to mention numerous additional such marketers in Arizona and El Paso County (See 1st Stip. of Facts par. 7(b), 7(c)).

18, notes (2), (4), (6), (7), (8), (10), (11), (12), (16), (18), (19), (23)). Practically all of the refineries supplying gasoline consumed in New Mexico were willing to, and did, sell to jobbers and dealers who retailed gasoline under brand names other than those of "major" companies (1st Stip. par. 2(d)). The same is true of available gasoline supplies in Arizona and El Paso County, Texas (1st Stip. of Facts pars. 2(e), 2(f)).

6. *Consequences of Continental's leasing of the Malco refinery*

Allegations: The refinery lease transaction of May 1, 1959, had the following, among other, consequences (Am. Comp. par. 23):

> "(c) Actual or potential elimination of fifty independent jobbers and distributors and more than two hundred service stations in New Mexico whose prices for gasoline have been lower than the prices charged by distributors and service stations handling major branded gasoline."
>
> "(h) An increase in the control by major oil companies over the marketing and prices of gasoline in New Mexico by elimination of the largest independent refiner and marketer[15] in said State and the largest source of supply of gasoline sold at 'cut rate' service stations in New Mexico."

Undisputed Facts: Since May 1, 1959, Continental has, through its subsidiary, Malco Products, Inc., continued to supply all of the former customers of Malco Refineries, Inc., who wished to continue buying gasoline from the refinery at Artesia for resale under the "Malco" name and

[15] Malco was *not* "the largest independent . . . marketer" in New Mexico. Its only marketing operation consisted of a single service station at Roswell (Lackey Dep. pp. 22, 23, 38, 39, 40, 106; Copple Dep. p. 10; HD 24, pp. 3, 4, 5; HD 31, pp. 3-4; HD 79, pp. 1, 5, 10; HD 96, p. 3); and Continental's acquisition of that one service station was conceded by the Government to be *de minimis* (Pre-Trial Tr. pp. 20, 27).

has also begun supplying several new customers of the same type (1st Stip. of Facts, par. 18). The gasoline output of the combined Continental and Maico refineries at Artesia greatly exceeds Continental's own requirements; hence, Continental is under continuing economic compulsion to keep on supplying "Maico" jobbers and distributors for the foreseeable future. (See Part VI (pp. 85-99) of the Appendix to Continental's Brief in court below.) The implication, that Continental was engaged in some sort of gigantic conspiracy with other "major" oil companies to control gasoline marketing and prices and to wipe out "price cutters," turned out to be sheer fantasy — another figment of the fertile imagination of the draftsman of the Government's pleading.

Thus, in the light of the undisputed facts of record, Appellant's whole case was seen to be based on a mistaken theory, and the essential averments of the Amended Complaint were exposed, one and all, as either greatly exaggerated or entirely fictitious. There was no possibility that Appellant could sustain the cause of action it had pleaded. It followed that Continental was "entitled to a judgment as a matter of law." Rule 56(c) of the Federal Rules of Civil Procedure.

C. No genuine issue as to any material fact remained to be tried

In its Jurisdictional Statement (pp. 2, 9-17) Appellant contends that the following four "issues" were in dispute:

> "(1) whether the State of New Mexico constituted a relevant submarket;
>
> (2) whether the two companies were in competition prior to the acquisition;

(3) whether the acquiring company had engaged in anticompetitive conduct following the acquisition; and

(4) whether there were mitigating circumstances which justified the acquisition."

As to each of these four issues, however, there was either no genuine issue as to the facts, or the issue was not material to the fundamental question: whether Appellant could sustain the fanciful cause of action it had pleaded.

1. *Whether New Mexico was a relevant submarket*

The Amended Complaint alleged that the State of New Mexico constituted the entire relevant market area. But the undisputed facts showed that the gasoline output of the Malco refinery was not distributed in New Mexico alone; that substantial volumes of such output also went to Arizona and El Paso County, Texas. Accordingly, Judge Rogers correctly held that those two additional areas should be included. This had the effect of minimizing still further the grossly inflated percentage figures Appellant had erroneously pleaded.

There could be no genuine dispute between the parties as to what the actual percentage figures were. Computation of such figures was a matter of simple arithmetic, inasmuch as the refinery capacities and the gasoline consumption and sales volumes had all been stipulated.

The only question, then, was whether a shrinking of the relevant market area would so materially change the percentages as to compel a finding that there had been a *substantial* lessening of competition. The percentages in question have already been stated (*ante*, p. 27). Manifestly, the question of substantiality could not turn on

whether Continental acquired 3.8% of the refining capacity serving New Mexico or 1.07% of such capacity serving the entire relevant market area.

Nor could the outcome here depend on whether retail sales of gasoline under the "Malco" brand represented 6.2% of total consumption in New Mexico or 4.3% of consumption in the whole relevant market. The exact size of the so-called "market share" percentages at the retail level is especially immaterial in this case, because Continental acquired control over only one retail outlet — an aspect of the transaction in suit so trivial that the Government conceded it to be *de minimis*. The situation at bar is entirely different from that involved in *Brown Shoe*, where the principal assets acquired consisted of over 400 *controlled* retail outlets (370 U.S. at pp. 303, 345). Here, Continental acquired only a lease on Malco's manufacturing facility at Artesia, a lease on Malco's solitary service station at Roswell, and Malco's trade marks and good will. Since none of Malco's gasoline customers were tied to it by contract, the item of "good will" represented simply an opportunity to solicit those customers' continuing business on a spot-purchase basis. Continental thereby gained neither controlled outlets nor an assured share of any gasoline market.

2. *Whether Continental and Malco were in competition prior to the acquisition*

The record in this case establishes conclusively that prior to May 1, 1959, there was no *substantial* competition between the parties to the refinery lease transaction. The absence of such competition necessarily resulted from the fact that Continental and Malco respectively sold most of their gasoline at different levels of wholesale distribution, largely to different types of wholesale customers.

(See Appendix to Continental Brief in court below, pp. 14-22, 72-76.) Perhaps the most cogent proof of the absence of any such competition is the further undisputed fact that during the entire 17-year span of Malco's participation in the petroleum refining business, there was not a single instance where a Malco customer switched to Continental or a Continental customer switched to Malco for gasoline supplies (Lackey Dep. pp. 31-32, 79).

Unable to show any actual competition of a substantial nature between Continental and Malco as corporate entities, the Government contends that there was bound to be competition between their customers; that "Malco" retail outlets were competing with "Conoco" retail outlets for the motorist's trade.[16] This contention might have some validity if, as in *Brown Shoe* (370 U.S. 294), Continental had acquired retail outlets. Here, however, the only asset that Continental acquired — aside from the one, concededly *de minimis*, Malco service station at Roswell — was the Malco manufacturing plant at Artesia. Such acquisition of refining facilities did not adversely affect the competition offered by "Malco" retail outlets, none of which Continental owned, operated or controlled in any way.

The record further conclusively shows that any competition there may have been between "Malco" and "Conoco" retail outlets prior to May 1, 1959, has persisted ever since. Between the acquisition date and the end of 1961, the number of "Malco" retail outlets in operation increased from 176 to 203 (1st Stip. of Facts, par. 17, p. 50). Total gasoline

[16] As shown in the Appendix to Continental's Brief in the court below (pp. 78-83), the record would sustain a finding that such competition at the retail level was far from "substantial." For present purposes, however, we need not go into that question.

sales to "Malco" customers were 7.7 million gallons greater in 1961 than they had been in 1958 — an increase of 8.5% (1st Stip. of Facts, pars. 10, 11).

3. *Whether Continental engaged in "anti-competitive conduct" after the acquisition*

There was no such "issue" in this case until Continental moved for summary judgment. Appellant's lawyers thereupon invented this new "issue," and injected it into the case by means of some remarkable affidavits.[17] Continental submitted no counter affidavits, because the new "issue" was, on its face, completely immaterial.

If, as the Government belatedly claims (and we vehemently deny), Continental engaged in "anticompetitive conduct" several years after the refinery lease transaction was concluded, that may form a basis for some other litigation; but it could not justify divestiture of the Malco refinery, which was the only specific relief sought by Appellant.

4. *Whether there were mitigating circumstances which justified the acquisition*

Clearly present in the case at bar were several "mitigating factors" (see Appendix to Continental's Brief in court below, pp. 26-71) which this Court found wanting in *Brown Shoe* (370 U.S. at p. 346).

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[17] The Jurisdictional Statement discreetly fails to mention that affiant Chamberlain is a "Malco" jobber at Phoenix, Arizona — outside the relevant market area Appellant urges as the proper one for purposes of this case. Affiants O'Reilly and Somerville, attorneys herein for the Government, apparently failed to realize that second- and third-hand hearsay, about what unidentified people were understood to have said when interviewed, is inadmissible as evidence of anything. *Syracuse Broadcasting Corp.* v. *Newhouse*, 236 F. 2d 522, 525 (2nd Cir. 1956); Federal Rules of Civil Procedure, Rule 56(e), as amended effective July 1, 1963.

However, the granting of summary judgment here did not depend on any issue respecting "mitigating factors." Such an issue would become material only if Appellant were able to make out a *prima facie* case; and that was manifestly impossible in the face of the undisputed facts of record. (See *ante*, pp. 25-31.) Rebuttal to an affirmative defense could not cure Appellant's complete inability to sustain its own alleged cause of action.

As Judge ROGERS put it in his notice to counsel on September 24, 1963:

> "It may well be that there remains in the case certain disputed issues of fact, but I do not feel they are material, and even if found in the Plaintiff's favor, it would avail them nothing."

D. Summary judgment may properly be granted in a case such as this

In *White Motor Co.* v. *United States*, 372 U.S. 253 (1963), this Court said (at. p. 259):

> "Summary judgments have a place in the antitrust field, as elsewhere, though, as we warned in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, they are not appropriate 'where motive and intent play leading roles'[18]. Some of the law in this area is so well developed that where, as here, the gist of the case turns on documentary evidence, the rule at times can be divined without a trial."

[18] In the *Poller* case, the five majority members of this Court stated: "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot" (368 U.S. at p. 473). The four dissenting Justices pointed out, however, that Federal Rule of Civil Procedure 56(c) "does not indicate that it is to be used any more 'sparingly' in antitrust litigation (*ante*, p. 473) than in other kinds of litigation, or that its employment in antitrust cases is subject to more stringent criteria than in others" (368 U.S. at p. 478).

As we have shown, the case at bar was a relatively simple one. No conspiracy was involved; Appellant's claim did not hinge on motive or intent; there was no "plot" to "thicken". The proof consisted primarily of stipulated facts and concededly genuine documents. Under these circumstances, a final determination by summary judgment was entirely appropriate and proper. *Associated Press* v. *United States*, 326 U.S. 1, 5-6 (1945); *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947); *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 86-87 (1950); *United States* v. *Krasnov*, 355 U.S. 5 (1959), affirming 143 F. Supp. 184 (D.C. Pa. 1956); rehearing den. 355 U.S. 908; *Gold Fuel Oil Service, Inc.* v. *Esso Standard Oil Co.*, 195 F. Supp. 85 (D.C. N.J. 1961); aff'd 306 F. 2d 61 (3rd Cir. 1962); cert. den. 371 U.S. 951 (1963).

In the *Krasnov* case, *supra*, the Court said (143 F. Supp. at p. 196):

> "The Government has established by the introduction of *documentary evidence* all of the facts necessary to establish its claim. The correctness and authenticity of each document . . . . have been admitted by at least one of the defendants involved in this action . . . . The documents cover the entire period of operation, were made concurrently with the events which they purport to portray and, since they are *genuine documents*, no issue of fact can arise with respect to any particular document which might in anywise cast doubt upon or weaken the effect of other documents."

In Fox v. Johnson & Wimsatt, 127 F. 2d 729 (D.C. Cir. 1942), a private antitrust suit, the Court said (at p. 737):

> "Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court."

In *United States* v. *General Instrument Corp.*, 87 F. Supp. 157 (D.C. N.J. 1949), the parties to an antitrust case entered into stipulations of fact and defendants admitted the authenticity of all of plaintiff's exhibits. In disposing of motions and counter-motions for summary judgment, the District Judge proceeded on this premise (at p. 165):

> "The facts determined, a court is not precluded from adjudicating the legal consequences to be drawn from undisputed facts."

In *Marion County Co-op. Ass'n* v. *Carnation Co.*, 114 F. Supp. 58 (D.C. Ark. 1953); aff'd 214 F. 2d 557 (8th Cir. 1954), the District Court granted summary judgment for the defendant in a private antitrust case, and in so doing made the following observations applicable to the case at bar (114 F. Supp. at p. 65):

> "A Court should be careful not to deprive a party of his day in court, but if the material before the Court discloses clearly that the issues are sham, frivolous, or so unsubstantial that it would obviously be futile to try such issues, then a summary judgment should be entered. In such a case, there would be no genuine issue of fact and the movant would be entitled to a judgment as a matter of law."

In *United States* v. *L. D. Caulk Co.*, 126 F. Supp. 693 (D.C. Del. 1954), the Court granted defendant's motion for summary judgment, aptly saying (at p. 696):

> "It is clear and admitted that an antitrust case is an appropriate proceeding for the application of summary judgment proceedings where the parties have stipulated the facts and the documents on which they respectively rely."

See also: *United States* v. *Celanese Corp. of America*, 91 F. Supp. 14, 17-18 (D.C. S.D. N.Y. 1950); *Dale Hilton, Inc.* v. *Triangle Publications, Inc.*, 27 F.R.D. 468, 470 (D.C. S.D. N.Y. 1961); *Bond Distributing Co.* v. *Carling Brewing Co.*, 32 F.R.D. 409, 415 (D.C. Md. 1963).

E. Findings of fact and conclusions of law in the court below were not only unnecessary but would have been ill-advised

Appellant's Jurisdictional Statement repeatedly points out (pp. 2, 8, 20) that no findings of fact and conclusions of law were entered in the District Court. The absence of such findings and conclusions, argues Appellant, "affords an added reason why the judgment below should be reversed" (p. 21). That argument represents one more blunder the Government has made in this case.

Rule 52(a) of the Federal Rules of Civil Procedure specifically provides that findings of fact and conclusions of law are unnecessary when summary judgment is granted under Rule 56. Failure to make and enter such findings in connection with a summary judgment is not error. *Lindsey* v. *Leavy*, 149 F. 2d 899, 902 (9th Cir. 1945); cert. den. 326 U.S. 783; *Simpson Bros.* v. *District of Columbia*, 179 F. 2d 430, 434 (D.C. Cir. 1949); cert. den. 338 U.S. 911. Indeed, when summary judgment is rendered, findings are an anachronism. "Sometimes such findings serve as a good summary; other times they are just a nuisance and cause trouble." *Dana Perfumes, Inc.* v. *Mullica*, 268 F. 2d 936, 937 (9th Cir. 1959). As stated in the latest appellate decision on this subject, *A R Inc.* v. *Electro-Voice, Incorporated*, 311 F. 2d 508, 513 (7th Cir. 1962):

> "Rule 52(a) expressly exempts decisions on motions for summary judgment from its provisions. Such specific findings and separate conclusions were not re-

quired to be stated. Where, as here, no genuine material factual issue is presented it would be ill-advised to make specific findings and separate conclusions. They would carry an unwarranted implication that a fact question was presented."

CONCLUSION

This appeal should be dismissed, or, in the alternative, the judgment appealed from should be affirmed.

Respectfully submitted,

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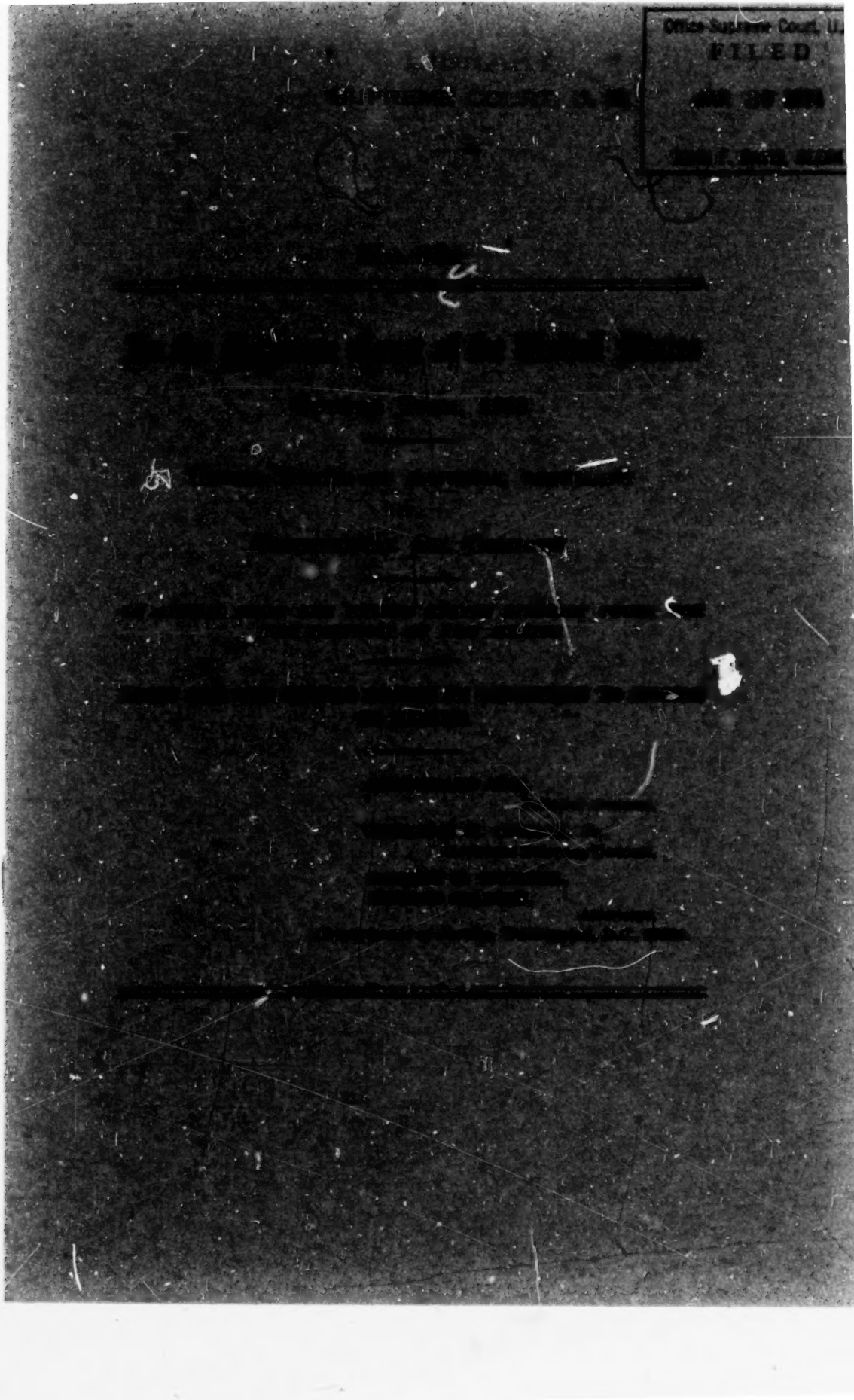
March 9, 1964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FILED

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 834

UNITED STATES OF AMERICA, APPELLANT

v.

CONTINENTAL OIL COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS

Continental Oil Company (the acquiring company) has moved to dismiss the government's appeal on the ground that Hondo Oil and Gas Co. (the selling company) is a necessary and indispensable party whose absence from the case precludes the entry of judgment against Continental.[1] The motion is not well-founded. The district court added Hondo as a party to this action solely because of Continental's assertions that Hondo's presence might be necessary to permit full relief. Should this Court reverse the

[1] Continental also moved to affirm. We do not respond to that motion here, for we believe the subject to be adequately treated in our Jurisdictional Statement.

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trial court's holding that Continental's acquisition did not violate Section 7 of the Clayton Act, Hondo may again be made a party upon remand for purposes of relief.

The complaint charged that Continental violated Section 7 by acquiring Hondo's refinery at Artesia, New Mexico, together with certain crude oil pipelines and gathering facilities, marketing facilities and trade name. The acquisition of the refinery was in the form of a 20-year lease with option to purchase. Continental was named as the sole defendant, and the complaint asked that Continental be required to establish a new corporation and transfer to it all the assets and rights acquired from Hondo.

Continental moved to add Hondo as a defendant on ground that its presence would be necessary to effect the relief sought by the government (R. 25).[1] The government opposed the motion as premature, pointing out that, if necessary, Hondo could be made a party when the court reached the issue of relief and that Hondo's presence was not necessary to determine whether Continental's acquisition violated Section 7. The district court granted Continental's motion to make Hondo a party defendant, and ordered the government to amend its complaint accordingly (R. 50). The government amended the caption of the complaint but it did not charge Hondo with any violation of law or even ask for any relief involving Hondo (R. 51).

Since then, Hondo has played only a nominal role in the proceedings. It noted an appearance, but filed

[1] R. refers to the unprinted record filed in this Court.

no answer to the complaint (R. 75). It never defended the legality of the acquisition; its participation in the case was limited to its agreeing to the various stipulations between the government and Continental (R. 386, 391). When Continental made a motion for summary judgment on grounds that the undisputed facts showed that it had not violated the law, Hondo did not join in the motion and did not file any motion on its own (R. 407). However, when the court granted Continental's motion, it dismissed the complaint as to Hondo as well (R. 705). Hondo's dismissal was a necessary consequence of the court's ruling that the acquisition did not violate the Clayton Act, for Hondo had been a party only on the theory that its presence might aid in granting relief against Continental if a violation were found. The dismissal did not involve any adjudication as to Hondo because Hondo had never been charged with any violation.[1] Further, since the court held that there had been no violation at all, it obviously had no occasion to determine whether, if there were a violation, any relief against Hondo would be appropriate. In short, the dismissal as against Hondo adjudicated absolutely nothing as to that company.

Accordingly, if this Court should reverse and remand, there is no barrier to joining Hondo as a party once more, if its presence should turn out to be neces-

[1] This fact distinguishes *Re Metropolitan Trust Co.*, 218 U.S. 312, on which Continental places major reliance (Motion, pp. 18-20).

sary to the granting of full relief.[4] The doctrine of *res judicata* would be no barrier for that doctrine bars a second suit only where the cause of action has been previously asserted and adjudicated. *Cromwell* v. *County of Sac*, 94 U.S. 351. Here, of course, no cause of action was ever asserted against Hondo.

Continental's entire argument (Motion, pp. 5–13) that Hondo is a necessary party for determining the merits of the case is based on the erroneous assumption that this is an action for reformation or cancellation of the lease between Continental and Hondo (see Motion, p. 6). But, as noted, that has never been the theory of the government's case; from the beginning, the relief sought was to have Continental assign its rights under the lease to a *new* corporation. Under the terms of the lease agreement, an assignment does not require the consent of Hondo (R. 34); and so it was not made a party defendant originally.

If this Court reverses the district court's judgment dismissing the complaint, and if Continental's acquisition of Hondo's assets is found to have been illegal, we believe that Hondo can again be brought into the case for purposes of relief. If we are wrong in that conclusion, however, that would be merely a factor for the district court to take into consideration in determining the scope of appropriate relief. In

[4] The fact that Continental would remain liable on the lease even after it divests the rights acquired under it does not make Hondo a necessary party (Motion, pp. 5–13). Any question whether to relieve Continental from that obligation is appropriately one to be resolved by the district court after decision on the merits.

either contingency, however, the fact that the government did not appeal from the dismissal of Hondo cannot possibly prejudice Continental in litigating the only issue now before this Court: whether the district court erroneously held that on the record Continental's acquisition did not violate Section 7 of the Clayton Act. There is no issue as to relief before this Court, and Hondo is not a necessary party to the determination of the substantive issues which this appeal involves.

For these reasons we respectfully submit that Continental's motion to dismiss should be denied.

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